

² The Board notes that, following the January 31, 2020 decision, OWCP received additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On August 18, 2017 appellant, then a 57-year-old electronic duplicating system technician, filed a traumatic injury claim (Form CA-1) alleging that on June 8, 2017 she sustained a gash on her forehead when a heavy metal door fell down on her head while in the performance of duty. On the reverse side of the claim form, her supervisor acknowledged that she was in the performance of duty when her injury occurred. Appellant did not stop work.

In medical referral forms dated June 8 and 9, 2017, Celia Macapagal, a nurse practitioner, noted that appellant bumped her head on a door and diagnosed a head contusion. She advised that appellant could return to full-duty work.

In an August 17, 2017 letter, T.M., appellant's supervisor, controverted appellant's claim, asserting that, after the claimed June 8, 2017 employment incident, she returned to work and completed her full shift. The next day appellant had a follow-up appointment and was released to full-duty work. T.M. claimed that he was not aware of any issues she was having until he received an email on August 15, 2017 stating that she was experiencing headaches. He also noted that appellant did not miss any time off work.

In a development letter dated August 23, 2017, OWCP informed appellant of the factual and medical deficiencies of her claim. It advised her of the type of factual and medical evidence necessary to establish her claim, provided her with a questionnaire for completion, and afforded her 30 days to submit the necessary evidence.

Appellant submitted a photograph of the door that struck her head and noted that it was not secured properly when it fell.

By decision dated September 29, 2017, OWCP denied appellant's traumatic injury claim, finding that she had not submitted any medical evidence containing a firm medical diagnosis from a qualified physician in connection with the accepted June 8, 2017 employment incident. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On September 27, 2018 appellant requested reconsideration of OWCP's September 29, 2017 decision.

In an October 9, 2017 diagnostic report, Dr. Uzuner Ovsev, Board-certified in neuroradiology, performed a computerized tomography scan that returned unremarkable.

February 7, 2018 discharge instructions noted that appellant was treated by Dr. Ronald Koury, Board-certified in emergency medicine concerning a diagnosis of high blood pressure.

In medical reports dated June 20 and July 20, 2018, Dr. Valdimir Markovic, Board-certified in family medicine, evaluated appellant for headaches. He made note of the June 8, 2017 employment incident in which a metal cabinet door fell on her forehead, as well as subsequent intermittent throbbing headaches. Appellant informed Dr. Markovic that she underwent a magnetic resonance imaging (MRI) scan, which was interpreted as normal. On evaluation, Dr. Markovic diagnosed a chronic post-traumatic headache and postconcussion syndrome.

On September 11, 2018 Dr. Robert Lanoue, a Board-certified neurologist, evaluated appellant for headaches she was experiencing. He noted that her headaches began in 2016 and also recounted the June 8, 2017 employment incident where a heavy cabinet door fell on her head. Dr. Lanoue further noted that, since the employment incident, appellant reported experiencing headaches frequently.

Dr. Markovic, in a September 20, 2018 medical report, noted his continued treatment of appellant for headaches. He diagnosed a chronic post-traumatic headache and prescribed medication.

By decision dated December 6, 2018, OWCP modified its September 29, 2017 decision to find that appellant had established the medical component of fact of injury. The claim remained denied, however, because she had not submitted a rationalized opinion from her treating physician explaining how her diagnosed medical condition was causally related to the accepted June 8, 2017 employment incident.

On January 17, 2020 appellant requested reconsideration of OWCP's December 6, 2018 decision. In an undated statement, she recounted her history of medical treatment and explained that she was still experiencing throbbing pain on the left side of her forehead.

OWCP received additional medical evidence. In an August 29, 2017 medical note, Ms. Macapagal indicated that appellant was experiencing headaches multiple times a day and noted the June 8, 2017 employment incident in which a metal cabinet door fell on her head. Dr. Markovic, in a report dated July 6, 2018, outlined a plan of care for a diagnosis of depression.

Appellant also resubmitted medical evidence previously considered by OWCP.

By decision dated January 31, 2020, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.³ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁴ The one-year period for requesting reconsideration begins

³ 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a).

on the date of the original OWCP decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board.⁵ Timeliness is determined by the document receipt date (*i.e.*, the “received date” in OWCP’s Integrated Federal Employees’ Compensation System (iFECS)).⁶ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁷

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.⁸ OWCP’s regulations and procedures provide that OWCP will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant’s request for reconsideration demonstrates clear evidence of error on the part of OWCP.⁹

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP’s decision.¹⁰ The Board notes that clear evidence of error is intended to represent a difficult standard.¹¹ Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to demonstrate clear evidence of error.¹² It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.¹³ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁴ In this regard, the Board will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁵ The Board makes an independent

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4a (September 2020).

⁶ *Id.* at Chapter 2.1602.4(b) (February 2016).

⁷ *See R.L.*, Docket No. 18-0496 (issued January 9, 2019).

⁸ *See* 20 C.F.R. § 10.607(b); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

⁹ *Id.* at § 10.607(b); *supra* note 5 at Chapter 2.1602.5(a) (February 2016).

¹⁰ *G.G.*, *supra* note 8.

¹¹ *M.P.*, Docket No. 19-0200 (issued June 14, 2019); *R.L.*, *supra* note 7.

¹² *E.B.*, Docket No. 18-1091 (issued December 28, 2018).

¹³ *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

¹⁴ *P.L.*, Docket No. 18-0813 (issued November 20, 2018).

¹⁵ *D.G.*, 59 ECAB 455 (2008); *A.F.*, 59 ECAB 714 (2008).

determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁶

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. The last merit decision of record was OWCP's December 6, 2018 decision. As appellant's request for reconsideration was received by OWCP on January 17, 2020, more than one year after the December 6, 2018 merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim.¹⁷

The Board further finds that appellant has not demonstrated clear evidence of error on the part of OWCP in its December 6, 2018 decision. The underlying issue is whether appellant met her burden of proof to establish a head condition causally related to the accepted June 8, 2017 employment incident. The Board finds that the argument and evidence she submitted in support of her request for reconsideration did not raise a substantial question as to the correctness of the denial of her claim.¹⁸

In support of her untimely reconsideration request, appellant submitted a September 6, 2017 full-duty release by Ms. Macapagal and a portion of a July 6, 2018 report by Dr. Markovic, who noted a diagnosis of depression. As noted, clear evidence of error is intended to represent a difficult standard.¹⁹ To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.²⁰ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. Neither the September 6, 2017 release, nor the July 6, 2018 report contain an opinion on the cause of appellant's head condition and, therefore, they do not on their face show that OWCP erred when it denied her claim for a traumatic injury to her head.²¹ Moreover, as nurse practitioners are not considered physicians under FECA,²² their medical

¹⁶ *W.R.*, Docket No. 19-0438 (issued July 5, 2019); *C.Y.*, Docket No. 18-0693 (issued December 7, 2018).

¹⁷ *Supra* note 5. *See also Debra McDavid*, 57 ECAB 149 (2005).

¹⁸ *See P.T.*, Docket No. 18-0494 (issued July 9, 2018).

¹⁹ *Supra* note 11.

²⁰ *See M.W.*, Docket No. 21-0925 (issued November 10, 2021).

²¹ *Id.*

²² Section 8101(2) of FECA provides that a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *See supra* note 5 at Chapter 2.805.3a(1) (January 2013); *M.J.*, Docket No. 19-1287 (issued January 13, 2020); *P.H.*, Docket No. 19-0119 (issued July 5, 2019); *T.K.*, Docket No. 19-0055 (issued May 2, 2019); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as nurses, physician assistants, and physical therapists are not competent to render a medical opinion under FECA). *See also W.Z.*, Docket No. 20-0191 (issued July 31, 2020) (a nurse practitioner is not considered a physician under FECA).

findings and opinions are of no probative value and are insufficient to shift the weight of the evidence and raise a substantial question as to the correctness of OWCP's decision.²³

Appellant also resubmitted medical evidence previously considered by OWCP. The Board notes, however, that duplicative and cumulative medical evidence does not raise a substantial question as to the correctness of OWCP's December 6, 2018 decision.²⁴

As the evidence submitted on reconsideration is insufficient to shift the weight of the evidence in appellant's favor or raise a substantial question that OWCP erred in the issuance of its December 6, 2018 decision, the Board finds that OWCP properly denied her reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

²³ *T.T.*, Docket No. 19-1624 (issued October 28, 2020).

²⁴ *Supra* note 12. *See also* *C.C.*, Docket No. 21-0896 (issued December 2, 2021); *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *G.B.*, Docket No. 18-1629 (issued April 15, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

ORDER

IT IS HEREBY ORDERED THAT the January 31, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 3, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board